Court of Appeal

Calling for a Higher Maximum Sentence in Child Abduction Cases

R v *Kayani; R* v *Solliman* [2011] EWCA Crim 2871

Keywords Child abduction; Sentencing; Child welfare; Deterrence

Both of these cases involved appeals against sentences by fathers for the offence of child abduction under s. 1 of the Child Abduction Act 1984. Kayani was sentenced to five years' imprisonment after giving a late guilty plea to the offence of child abduction. A Pakistani man, he married his British wife and had two sons during the course of the marriage. When the marriage deteriorated the parties separated, with Kayani stating that if his wife left him he would take the children and return to Pakistan (at [20]). Following private court proceedings, an interim measure was put into place prohibiting him from taking the children out of their mother's control. Subsequently contact arrangements were made by a court order that included a condition being placed on Kayani to leave his passport with the children's mother whilst he had contact with the children. Initially he appeared to comply with the court order. However, he obtained a replacement UK passport after falsely claiming that his original passport had been stolen. He also obtained Pakistani passports for the two children without the mother's knowledge. During an extended period of contact with the children in January 2000, Kayani flew to Pakistan with the children using his falsely claimed passport and new Pakistani passports for his sons. The mother never saw her sons again, despite making every effort to find them and taking out court proceedings in Lahore. Kayani returned with the children in 2009 without contacting the mother, but was discovered through a routine search of the missing persons register (at [27]). During police interviews the sons refused to respond without the presence of their father or his solicitor and the appellant 'was unrepentant' and willing to use his sons to protect himself from the consequences of what he had done (at [28]). The sons continued to refuse to have contact with their mother and in practical terms the court accepted that 'she ha[d] lost them forever' (at [29]).

Kayani appealed against his sentence for the offence of child abduction arguing that the sentencing judge had erred in law. First, the judge had not taken into sufficient consideration the fact that the father was the sole carer of the children. This was an inappropriate case to pass a deterrent sentence and in addition such a sentence amounted to a violation of the children's right to respect for family life contrary to Article 8 of the European Convention on Human Rights (at [32]).

Solliman was sentenced to three years' imprisonment following his conviction for three counts of child abduction in February 2011. He left the UK in 2002 after obtaining false travel documents in a false name.

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With these documents he booked flights to Egypt in that false name, thus avoiding restrictions on his departure. In breach of a court order he removed all three children to Egypt, ending the mother's contact with her children. He returned with his children during 2009 which came to the mother's notice through a social networking site. Following his subsequent arrest and whilst awaiting his sentencing, the children remained in his care. Solliman's counsel initially advised against any appeal against sentence; however, he decided to seek leave to appeal out of time as a result of comments made by the judge in related family court proceedings. The family court judge expressed the opinion that the profound distress of the children as a result of their father's absence whilst he served his prison sentence made the sentence not 'child centred'. In her view, this sentence meant '[t]he children have been victims twice—of being abducted but also of being deprived of their father's care' (at [42]). The court was asked to decide whether the current interests of the children warranted a reduction to the sentence.

Held, dismissing the appeals against sentence, even allowing for the interests of the children, it is appropriate to pass a custodial sentence that reflects both the culpability of the offender and the harm caused. There is no reason to make exceptions to this position in child abduction cases where the abductor of the child is the child's parent. Any damage to the child's welfare caused by the abducting parent's prison sentence is an outcome of the offending harm.

In the Court of Appeal's view the maximum sentence for child abduction is currently too low in respect of serious cases, and the court determined that Kayani's five-year sentence of imprisonment, although at the end of the higher bracket following a guilty plea, was not manifestly excessive. In respect of Solliman's appeal, the court would have supported the passing of a longer sentence.

Commentary

The maximum penalty available to the sentencer of a convicted kidnapper is life imprisonment. In truth, cases at the extreme end of child abduction bear a close semblance to kidnapping. This is evident in the present cases where the relationship between the parent left behind and their children is 'irredeemably severed' on account of the lengthy duration of the abduction. Despite this correlation, the maximum penalty available to the sentence of a convicted child abductor is seven years' imprisonment. The court took the view that this discrepancy is illogical and fails to provide the sentencing judge of a child abductor with the appropriate sentencing options that reflect the true justice of the case, the culpability of the offender and the harm caused by the offence (at [5]). This is not a concern that is unique to the present appeals given the growing number of cases of child abduction to countries which are not signatories to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (at [4]).

The Court of Appeal further considered its view that in such circumstances as the present appeals, child abduction is akin to child kidnapping. In doing so, the court reviewed previous case law in this area. Prior to the enactment of the Child Abduction Act 1984 and the creation of the offence of child abduction (by a parent, s. 1; by a stranger, s. 2), the House of Lords ruled that a parent can commit the offence of kidnapping his or her own child in *R* v *D* [1984] AC 778, and there was no defence of lawful excuse 'in the face of the radically changed social and legal attitudes of today' (at 805, *per* Lord Brandon (cited at [6])). With the creation of the Child Abduction Act 1984, the Court of Appeal cast doubt over the existence of the offence of child kidnapping in *R* v *C* [1991] 2 FLR 252, suggesting that only the offence of child abduction should be charged in cases involving kidnapping by parents (Watkins LJ (cited at [10])). In the present appeals, the court clearly states that the decision in *R* v *C* no longer represents the current legal position as it 'has been overtaken by events' (at [13]). It is not entirely clear what the court means by this phrase, and it is not a question that the court had been asked to determine in these appeals.

The court acknowledged that the ability to convict parents of kidnapping their own children is particularly difficult given the nature of the elements of the offence. The court takes the opportunity to emphasise the current confused definition in law of 'kidnapping', recognising that the Law Commission was consulting on this issue at that time. As regards the ingredients of the offence of kidnapping, the court relied on a passage in *Smith and Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) where the difficulty of the confused relationship between the offence ingredients was highlighted:

> (i) the deprivation of liberty, (ii) the absence of consent, (iii) being taken or carried away, (iv) the use of force or fraud, (v) the absence of a lawful excuse . . . it is difficult to determine whether the force or fraud must be the means of carrying away . . . or the reason for the lack of consent. A further question is whether the consent must be (a) to the taking or carrying away, (b) the deprivation of liberty, (c) both, (d) being taken by force or fraud. (at [14])

It is unlikely that force or fraud was used by the defendants in this case towards the children to remove them from the country and the care of their other parent. Any attempt to inquire as to the existence of such force or fraud for evidence purposes would, in the court's view, amount to additional trauma suffered by the children involved (at [15]). The offence of child abduction differs in a significant way from the offence of kidnap in respect of the issue of consent. Under s. 1 of the 1984 Act it is an offence for a parent with a child under the age of 16 to take or send the child out of the UK without the appropriate consent. Such consent is defined within s. 1(3) and includes the consent of the mother or father with parental responsibility. It is therefore the lack of consent of the other parent, rather than the lack of consent of the taken child, that is required.

Section 1 does not specify the level of harm that needs to be caused to the other parent by the abduction.

It seems the construction of the offence of child abduction does not allow for considerations of culpability and harm caused and justifies the lower maximum sentence at seven years as a result. Again *mens rea* is not clearly reflected by the offence of kidnap. However, to warrant a maximum penalty of life imprisonment, it must require a high level of culpability reflected by an intent to take or carry away, intention to use force or fraud with the purpose of taking away, or intent to use force or fraud as the reason for the lack of consent.

In the paradigm case of child abduction by a parent represented by the facts of the present appeals, there appears to be an intention to take children away using fraudulent means without the consent of the parent. The purpose of the taking is to deprive both the mother and child of the normal loving relationship enjoyed as a part of family life.

The Court of Appeal is correct to illustrate the similarities between the paradigm cases of child abduction and kidnapping: both involve the use of fraud, but end in various degrees of harm; both a kidnapping or an abduction could be for a short period of time with no long-term damage caused to the immediate victim. Where the kidnapping or abduction is for a period sufficiently long to cause 'irredeemably severed' family ties, the offender has deprived both the immediate victim and his or her family members of the right to respect for family life, and the state is required to take positive action in respect of such offending (*X and Y* v *Netherlands* (1985) 8 EHRR 235). Given that the harm caused, whether by virtue of a kidnap or an abduction, it is equally serious, and where fraud was used to bring about the kidnap or abduction, the culpability of the offender is very similar if not identical. In such circumstances the court is correct to highlight the illogical position that the penalty for abducting a child is severely hampered by the constraints of the maximum sentence prescribed by Parliament in a way that the penalty for a kidnapping offence is not. Allowing such a discrepancy arguably fails to deter a parent sufficiently from committing child abduction, and the court's recommendation that the maximum sentence for child abduction, pending any changes to the substantive law either in relation to kidnapping or child abduction, is appropriate.

In the event that the maximum penalty for the offence of parental child abduction under s. 1 of the Child Abduction Act 1984 is raised, guidelines would be essential to assist sentencers in respect of starting points and aggravating features of cases. Following the ratification of the Hague Convention on the Civil Aspects of International Child Abduction 1980, research has shown a shift in patterns of international parental child abduction. The global pattern from at least the 1990s has been that taking parents are predominantly mothers whilst the fathers are predominantly the left-behind parents (N. Lowe, 'A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I—Global Report', Preliminary Document No. 8 A of May 2011 (Hague Conference on Private International Law: The Hague, 2011)). Unexplored is any explanation for this changing pattern and the part violence against women may play in this context. A return order under the

Hague Convention can be resisted where there is a grave risk of physical or psychological harm to the child under the exceptions contained in Article 13(b). This exception could be included as a specific defence in cases involving child abduction by a parent trying to escape domestic abuse. This would be acutely necessary where the maximum penalty for the offence was raised.

These cases raise an interesting issue concerning the extent to which the interests of the child should outweigh principles of punishment when sentencing an offender. Both appellants based their appeals against sentence on the fact their children suffered a high degree of distress by their father's imprisonment; the father being the children's sole carer, as they had rejected their mothers entirely. Such was the distress caused to Solliman's children, the family court judge involved in related proceedings commented:

> You may relay to the Court of Appeal Criminal Division that, whilst I understand that the sentencing judge may have felt—given reasons of policy and deterrence—it necessary to impose immediate imprisonment, and acknowledging that child abduction is a very serious offence, given the complete alienation of the children from their mother . . . the only competent parent is the defendant father, who is in every respect a good father. The impact of such a sentence . . . appears not to be child centred. The children have been victims twice—of being abducted but also of being deprived of their father's care. (at [42])

It is gravely concerning that the family court does not take into account the abducting parent's own responsibility for the level of harm caused to his or her own children. For the state to fail to deter parents from causing such a high level of emotional harm to both their own children and the left-behind parent could amount to a breach of international human rights law, with the state seen to be complicit or indifferent to the fundamental rights of the child and the mother. This crime falls within the remit of domestic violence and should accord more weight during family court proceedings, rather than less weight within the criminal justice framework. The Court of Appeal correctly observed that any mitigation based on the right to family life was misconceived as the appellant was seeking to rely on the very principle that the offence he committed violated in respect of his own children and the left-behind parent (at [54]).

Custodial sentences are not unavailable generally in respect of convictions for serious offences of offenders who are the sole carers of children. The level of harm caused in these cases was described by the court as causing 'extreme emotional hardship' to the mothers and deprived the children, albeit without their awareness, 'of one of the foundations for a fulfilling life'. This harm was the intended consequence—allowing the starting point for sentencing to begin at the higher end of the appropriate bracket despite, in Kayani's case, providing an early guilty plea. The court was clearly swayed by the fact the appellants had created the traumatic circumstances their children found themselves in. A reduction in sentence would allow the appellants to

benefit from their own crime 'one consequence of which is that his children have become solely dependent on him' (at [49]).

The court reviewed earlier appeals concerned with sentencing decisions of parental child abduction offences. All involved different facts with only one successful appeal for a reduction in sentence. *R* v *Dryden-Hall* [1997] 2 Cr App (S) 235 could be distinguished from the present appeals. The appellant was a mother who abducted her child for a period of 21 months, significantly less than in the present cases. She was granted a reduction in sentence as a result of the broken bond between herself and the abducted child. The child no longer wanted a relationship with her. In this respect the harm caused as a consequence of her actions was not as severe to the child and the left-behind parent compared with the present appeals. The Court of Appeal concluded that, following its earlier decision, sentencing decisions for parental child abduction offences require a significant element of deterrence (at [53]). It is therefore unsurprising that both appellants' appeals were dismissed in the present cases. The Court of Appeal's strong stance in these cases of 'outrageous circumstances' is commendable.

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Psychiatry and the New Diminished Responsibility Plea: Uneasy Bedfellows?

R v *Brown (Robert)* [2011] EWCA Crim 2796

Keywords Coroners and Justice Act; Diminished Responsibility; Murder; Manslaughter; Sentencing

In this case the Court of Appeal considered whether the words 'substantially impaired' under s. 52(1)(b) of the Coroners and Justice Act 2009 ('the 2009 Act') imported a different test from that which was applied to the term 'substantial impairment' contained within the original s. 2(1) of the Homicide Act 1957 ('the 1957 Act'). In essence, the primary issue was whether the 'less than total but more than trivial' ruling adumbrated in *R* v *Ramchurn* [2010] EWCA Crim 194 continued to apply to the revised plea. The Court of Appeal also reviewed the relationship between Sch. 21 to the Criminal Justice Act 2003 ('the CJA 2003') and sentencing in manslaughter cases.

On 31 October 2010, the appellant (B) met his estranged wife at her home and killed her by repeatedly and violently striking her over the head with a hammer. The children of the couple were in a room two doors away when their mother was attacked. The daughter witnessed her father (B) wrapping up her mother's body before placing it into the car. As B drove the children to his house, his son asked if B was taking the victim to hospital, but B never did so, and he failed to call an ambulance. Having left the children with his girlfriend, B drove to Great